UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:17-bk-01712-FMD
Chapter 11
ATIF, Inc.,

Debtor.
_____/

Daniel J. Stermer, as Creditor Trustee,

Plaintiff,

vs. Adv. Pro. No. 9:18-ap-531-FMD

Old Republic National Title Insurance Company, Old Republic National Title Holding Company, and Attorneys' Title Fund Services, LLC,

Defendants.
_____/

ORDER DENYING CARLTON FIELDS, P.A.'S MOTION FOR SANCTIONS

Under Fed. R. Civ. Pro. 45(d)(1), parties responsible for issuing subpoenas are required to take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena and courts are required to enforce this duty and to impose an appropriate sanction on a party who fails to comply. In this case, Plaintiff issued a subpoena for deposition under Fed. R. Civ. Pro. 30(b)(6) to a non-party law firm's designated representative and later issued subpoenas for deposition to three attorneys with the law firm as fact witnesses. After conducting the depositions of the three fact witnesses, Plaintiff deposed the law firm's representative. Several months after the depositions were concluded, the law firm moved for sanctions under Rule 45(d)(1). Because the Court finds that the law firm has an interest in the outcome of this Adversary Proceeding, that disparities exist in the parties' relative resources, and that the law firm was responsible, in part, for the manner in which Plaintiff conducted the depositions, the Court will exercise its discretion and deny the motion for sanctions.

A. Background

On March 2, 2017, ATIF, Inc. ("Debtor") filed a petition under Chapter 11 of the Bankruptcy Code. Plaintiff is the Creditor Trustee under the *Order Confirming Second Amended Chapter 11 Plan Filed by Official Committee of Unsecured Creditors* in Debtor's Chapter 11 case.[1]

In October 2018, Plaintiff initiated this adversary proceeding by filing a complaint against the alleged transferees of Debtor's assets, generally referred to by the parties as the "OR Defendants," (the "Adversary Proceeding.") Plaintiff seeks to avoid and recover the alleged transfers from the OR Defendants under the Florida Uniform Fraudulent Transfer Act and 11 U.S.C. § 548. The transfers arise from a series of pre-bankruptcy transactions between Debtor and the OR Defendants that occurred in 2009, 2011, and 2015 (the "Transactions").

Attorneys with Carlton Fields, P.A. ("Carlton Fields") had represented Debtor in connection with the 2011 Transaction. However, in connection with the 2015 Transaction, under which Debtor transferred most of its assets to the OR Defendants, Carlton Fields represented the OR Defendants and Debtor was represented by separate counsel.

Carlton Fields is not a party to the Adversary Proceeding. However, in July 2019, Plaintiff, as Creditor Trustee, filed a lawsuit in the Circuit Court in and for Hillsborough County, Florida, against Carlton Fields and certain of its attorneys alleging their professional malpractice and breach of fiduciary duty in connection with the 2015 Transaction (the "Malpractice Lawsuit").[2]

In October 2019, Plaintiff served, in the Adversary Proceeding, a notice of taking the deposition of Carlton Fields' representative under Rule 30(b)(6)[3] and issued a subpoena to Carlton Fields (the "Subpoena") to testify at a deposition

[1] Main Case, Doc. No. 338.
[2] Main Case, Doc. No. 791 (filed under seal).
[3] Under Fed. R. Bankr. P. 7030, Rule 30 applies in adversary proceedings.

scheduled for January 13, 2020.[4] The Subpoena included a list of nineteen topics to be covered at the deposition (the "Topics"). Carlton Fields designated one of its attorneys, Steven C. Dupre, as its representative for purposes of the Rule 30(b)(6) deposition.[5] Mr. Dupre had not performed any legal services for Debtor or for the OR Defendants, and he did not have personal knowledge of any of the Topics. On December 27, 2019, Plaintiff served deposition subpoenas on three Carlton Fields lawyers who did have personal knowledge of the Transactions (the "Fact Witnesses").[6]

On January 3, 2020, Carlton Fields filed a *Motion for Protective Order and to Modify Subpoena to Testify at Deposition* (the "First Motion").[7] In the First Motion, Carlton Fields asserted that Mr. Dupre, its designated representative, was unavailable on January 13, 2020, the date of the scheduled Rule 30(b)(6) deposition; that Plaintiff had also subpoenaed the three Fact Witnesses for deposition in February 2020; and that the Topics were overly broad. Accordingly, Carlton Fields requested the Court to order Plaintiff to reschedule the Rule 30(b)(6) deposition until after Plaintiff had deposed the three Fact Witnesses and to address the scope of the depositions, if necessary.

On January 7, 2020, after considering Plaintiff's opposition,[8] the Court entered an order granting the First Motion (the "First Order"). The First Order directed the parties to reschedule the Rule 30(b)(6) deposition to a mutually agreed date after the depositions of the Fact Witnesses, without prejudice to Carlton Fields' right to object to the Topics within fourteen days of the First Order's entry.[9] The Court reserved jurisdiction to consider Carlton Fields' request for attorney's fees in connection the First Motion.[10]

Carlton Fields timely filed a *Second Motion for Protective Order and to Modify Subpoena to Testify at a Deposition* (the "Second Motion").[11] In the Second Motion, Carlton Fields stated that it was filing the Second Motion to comply with the First Order, but that its objections to the Topics should be addressed after the Rule 30(b)(6) deposition was concluded. In addition, Carlton Fields asserted, for the first time, that Plaintiff would violate Rule 45(d)(1)[12] if he conducted a Rule 30(b)(6) deposition that was "redundant or cumulative" of the depositions of the Fact Witnesses.[13] Carlton Fields concluded the Second Motion by requesting

> that the Court, if necessary, enter an order modifying the scope of the Subpoena in accordance with Carlton Fields' objections, requiring Plaintiff to pay reasonable expenses associated with the deposition, and requiring Plaintiff's payment of Carlton Fields' expenses in connection with this motion and its prior motion for protective order, including reasonable attorneys' fees, in accordance with Rules 26(c)(3) and 37(a)(5), and grant such other relief the Court deems appropriate.[14]

In light of Carlton Fields' stated position that the Court should not rule on its objections to the Subpoena's list of Topics until after the Rule 30(b)(6) deposition was concluded, the Court entered an order deferring ruling on the Second Motion until Carlton Fields informed the Court of a request for hearing on its objections to the list of Topics (the "Second Order").[15]

Between February 11 and 13, 2020, Plaintiff deposed the three Fact Witnesses. And on March 11, 2020, Plaintiff conducted the Rule 30(b)(6) deposition of Carlton Fields' designated representative, Mr. Dupre. The attorney who

---

[4] Doc. No. 143-1. The Court has previously ruled on the OR Defendants' assertion of the attorney-client privilege relating to their communications with Carlton Fields' attorneys. (Doc. No. 119, Transcript of October 7, 2019 hearing, pp. 7:20-23, 15:5-9.)

[5] According to Carlton Fields, Mr. Dupre had been identified as its 30(b)(6) witness "from the very beginning." (Doc. No. 280, Transcript of September 15, 2020 hearing, p. 14).

[6] Doc. No. 249, ¶ 8; Doc. No. 249-5.

[7] Doc. No. 143.

[8] Doc. No. 145.

[9] Doc. No. 146.

[10] Doc. No. 146, ¶ 5.

[11] Doc. No. 148.

[12] Under Fed. R. Bankr. P. 9016, Rule 45 applies in adversary proceedings.

[13] Doc. No. 148, ¶ 10.

[14] Doc. No. 148, ¶ 12.

[15] Doc. No. 150.

represents Carlton Fields in the Malpractice Lawsuit appeared on behalf of the witnesses at the depositions and made numerous objections, primarily to the form of the questions.[16]

On August 18, 2020, Carlton Fields filed its *Request for Hearing on Motions for Protective Order*, which the Court and the parties have deemed to be a request for sanctions (the "Sanctions Motion").[17] Carlton Fields alleges, first, that the Rule 30(b)(6) deposition was a "canned rehash" of the depositions of the Fact Witnesses, and second, that despite Plaintiff's refusal to narrow the Topics, his attorney examined Mr. Dupre as the Rule 30(b)(6) representative on only a portion of the Topics. Carlton Fields contends that Plaintiff violated his duty under Rule 45(d)(1) to avoid the imposition of an undue expense on persons subject to a subpoena, and asks the Court to award it $80,683.50 based upon the hourly billing rates of the three Fact Witnesses and Mr. Dupre for the time the Fact Witnesses spent at their depositions and for the time Mr. Dupre spent to prepare for and testify at his deposition.[18]

Plaintiff opposes the Sanctions Motion on several grounds.[19] Plaintiff asserts, first, that Carlton Fields was obligated under Rule 30(b)(6) to designate a representative to prepare and testify on its behalf; second, that the witness fees of the Fact Witnesses are fixed by law at $40.00 per day;[20] and third, that to the extent Carlton Fields seeks fees for filing its motions, it is Carlton Fields that has obstructed the discovery process. Plaintiff contends that it was entitled to take Carlton Fields' Rule 30(b)(6) representative's deposition and that the Fact Witnesses, who were under no obligation to prepare for their depositions, had testified that that they "did not recall," "did not remember," or "had no recollection" in response to many questions asked during their depositions.[21]

At a hearing on September 15, 2020, Plaintiff's counsel represented that it was necessary for Plaintiff to proceed with the Rule 30(b)(6) deposition because of the Fact Witnesses' lack of recall. Plaintiff further contended that Carlton Fields could have obviated the need for Mr. Dupre's deposition as Carlton Fields' representative if it had designated one or more of the Fact Witnesses as its Rule 30(b)(6) witness(es).[22]

At the conclusion of the hearing, the Court requested that Plaintiff file a report identifying the questions that Plaintiff contends it was compelled to ask the Rule 30(b)(6) witness because Plaintiff was unable to obtain adequate responses from the Fact Witnesses, and that Carlton Fields file a response to Plaintiff's report.[23] Generally, having reviewed the parties' reports,[24] the Court concurs with Carlton Fields' analysis that (1) Mr. Dupre, as the Rule 30(b)(6) representative, did not respond to questions in greater or more significant detail than testified by the Fact Witnesses; and (2) although one or more of the Fact Witnesses may not have been able to answer Plaintiff's counsel's question due to that Fact Witness(es)' lack of knowledge of a particular document, another of the Fact Witnesses did have actual knowledge of the document at issue and was able to respond to questions regarding it.

B. Discussion

Under Federal Rule of Civil Procedure 45(d)(1), a party or attorney serving a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and courts must enforce the duty by imposing appropriate sanctions—which may include lost earnings and reasonable attorney's fees—if a party or attorney does not comply.[25] The decision to award sanctions under Rule 45(d)(1) is

[16] Doc. Nos. 258, 259, and 260 (filed under seal).
[17] Doc. No. 219.
[18] Doc. No. 219-6. Of the total amount requested, Carlton Fields contends that Mr. Dupre spent 87.9 hours at his standard hourly billing rate of $830.00, totaling $72,957.00, in connection with the Rule 30(b)(6) deposition.
[19] Doc. Nos. 249 and 257.
[20] 28 U.S.C. § 1821.
[21] Doc. No. 249, ¶ 15.
[22] Doc. No. 280, Transcript of September 15, 2020 hearing, pp. 18-20.
[23] *Id*. at pp. 23-26.
[24] Doc. Nos. 273, 276.
[25] Fed. R. Civ. P. 45(d)(1).

discretionary with the court and generally made after balancing the need for discovery against the burden imposed on the person from whom discovery was sought.[26]

At the outset, the Court notes that most of the caselaw involving sanctions under Rule 45(d)(1) relates to a non-party's request to recover the costs it incurred in connection with producing documents under a subpoena. The Court is not aware of any caselaw supporting a law firm's request for compensation of the law firm's own attorneys who are fact witnesses or Rule 30(b)(6) witnesses for time spent preparing for and attending their depositions at the attorneys' regular hourly billing rates.

The court in *In re American Kidney Fund, Inc*., addressed the issue of "undue burden" under Rule 45(d)(1) as follows:

> In place of the aforementioned "undue burden" test, some courts have employed what essentially amounts to a balancing of the equities to determine whether to shift a non-party's fees and costs under this discretionary prong of Rule 45(d). When undertaking this balancing, "courts must consider the following factors: (1) whether the non-party has an interest in the outcome of the case; (2) whether the non-party's financial status allows it to more easily bear the costs than the requesting party; and (3) whether the litigation is of public importance."[27]

Each of these three factors weighs against an award of sanctions in favor of Carlton Fields under its Sanctions Motion.

First, although Carlton Fields is not a party in this adversary proceeding, it has an interest in its outcome.[28] As the Court in *Sun Capital Partners, Inc. v. Twin City Fire Insurance Company* put it, "where a non-party is involved in litigation arising out of the same facts of a case, the non-party is not a truly disinterested party for purposes of awarding costs."[29] This adversary proceeding and the Malpractice Lawsuit arise out the same set of facts—the Transactions—and Carlton Fields' interest in this adversary proceeding is evidenced by the appearance and participation of its Malpractice Lawsuit attorney at the depositions in this proceeding on behalf of the witnesses. The Court concludes that Carlton Fields is not a typical non-party with no interest or stake in the outcome of the proceeding.

Second, although there is no record evidence of Carlton Fields' financial status, it is a well-known and highly regarded law firm with offices throughout Florida and the United States. In contrast, the Creditor Trustee represents the interests of the creditors of a bankrupt debtor against whom millions of dollars in claims have been filed. Any sanctions award would have a deleterious effect on Debtor's creditors. This factor weighs against awarding sanctions against the Creditor Trustee.

Third, as to the public interest factor, the Court is unaware of any broad public importance to this case or the depositions at issue. Like the court in *In re American Kidney Fund*, the Court notes that other courts "have varied in how the importance of a case [a]ffects the decision on whether to shift costs from one party to another."[30] The Court does not find the public interest factor to be relevant to its ruling.

---

[26] *In re Subpoenas Served on the American Kidney Fund, Inc*., 2019 WL 1894248, at *5 (D. Md. April 29, 2019).

[27] *Id*. at *8(citations omitted).

[28] Under Fed. R. Civ. P. 45(d)(2)(B)(ii), a non-party's interest in the case is a factor for determining whether to shift the costs of discovery from the non-party to the discovering party. *Raymond James & Associates, Inc. v. Terran Orbital Corp*., 2020 WL 5367319, at *2 (S.D. Fla. Sept. 8, 2020)(quoting *Sun Capital Partners, Inc. v. Twin City Fire Insurance Company*, 2016 WL 1658765, at *7 (S.D. Fla. Apr. 26, 2016)).

[29] 2016 WL 1658765, at *7.

[30] 2019 WL 1894248, at *9(citing *Jeune v. Westport Axle Corp*., 2016 WL 1430065, at *3 (W.D. Va. Apr. 8, 2016) and *Bell Inc. v. GE Lighting, LLC*, 2014 WL 1630754, at *14 (W.D. Va. Apr. 23, 2014)).

In addition, the Court has considered that "a party is entitled to information that is relevant to a claim or defense in the matter."[31] Here, Plaintiff was entitled to take a Rule 30(b)(6) deposition of Carlton Fields. Plaintiff scheduled the depositions well within the established discovery period,[32] and provided adequate notice and response time to Carlton Fields. Plaintiff's conduct is very different from the sanctionable conduct found by the Eleventh Circuit Court of Appeals in *Progressive Emu Inc. v. Nutrition & Fitness Inc*.[33] In *Progressive Emu*, after discovery had closed, the plaintiff served a subpoena on the defendant's parent company demanding the production of ten categories of documents over a ten-year period within one business day of the service of the subpoena.[34] The district court imposed sanctions under Rule 45(d)(1) and awarded the defendant its reasonable attorney's fees.[35] On appeal, the Eleventh Circuit affirmed the award, finding that the plaintiff "violated Rule 45 and circumvented the discovery process" by issuing the overly broad subpoena on the eve of trial and seeking documents that it had failed to request during the discovery period.[36]

Also, much of the expense associated with the four depositions was brought about by Carlton Fields' own tactical decisions. For example, Carlton Fields elected to designate Mr. Dupre as its Rule 30(b)(6) witness "from the beginning" of its involvement in this proceeding,[37] even though he had no personal knowledge of the Transactions.[38] Carlton Fields could have designated one or more of the Fact Witnesses as its Rule 30(b)(6) witnesses, but chose not to do so. And after Plaintiff scheduled the depositions of the Fact Witnesses, Carlton Fields filed the First Motion specifically requesting that Mr. Dupre's Rule 30(b)(6) deposition be rescheduled to a date *after* the depositions of the Fact Witnesses.[39] While Mr. Dupre may not have supplied any significant information in his Rule 30(b)(6) deposition that was not already covered in the Fact Witnesses' depositions, Plaintiff was permitted to inquire into the areas in which the Fact Witnesses lacked detail or recollection.

Finally, the Court notes that Carlton Fields was compelled to file the First Motion because Plaintiff refused its reasonable request to reschedule the Rule 30(b)(6) deposition. While Plaintiff's refusal to cooperate on a scheduling issue is grounds for an award of sanctions to Carlton Fields, the Court has balanced the costs that Carlton Fields incurred in connection with the First Motion against the burden placed upon Plaintiff to respond to the Sanctions Motion and declines to award sanctions.

Accordingly, for the foregoing reasons, it is

ORDERED that *Carlton Fields, P.A.'s Request for Hearing on Motions for Protective Order*, treated as a motion for sanctions against Plaintiff under Fed. R. Civ. P. 45(d)(1), is **DENIED**.

DATED: November 18, 2020.

/s/ Caryl E. Delano

_____

Caryl E. Delano
Chief United States Bankruptcy Judge

[31] *Id.* at *5(quoting *Smith v. United Salt Corp*., 2009 WL 2929343, at *5 (W.D. Va. Sept. 9, 2009)).
[32] *See* Doc. No. 188, Second Amended Order Setting Trial, Pre-Trial Schedule, Summary Judgment Briefing Schedule and Requiring Mediation, dated May 14, 2020.
[33] 785 F. App'x 622 (11th Cir. 2019).
[34] *Id.* at 628.
[35] *Id*. at 627.
[36] *Id*. at 629.
[37] Doc. No. 280, Transcript of September 15, 2020 hearing, p. 14.
[38] Carlton Fields represents that Mr. Dupre spent 87.9 hours in connection with his Rule 30(b)(6) deposition (Doc. No. 219-6), which lasted 3.5 hours (Doc. No. 219, ¶ 8).
[39] Doc. No. 143.